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THE JURISDICTION OF A COURT OF EQUITY OVER CONSTITUTIONAL CONVENTIONS.—A decision was recently handed down in Oklahoma, by a divided court, the effect of which is to deny the jurisdiction of a court of equity in cases where the validity of the acts of a constitutional convention is brought into question. *Frantz et al.* v. *Autrey* (1907), — Okla. —, 91 Pac. Rep. 193.

The case is one of peculiar interest, not only because of its political background, but because of the vigor of the dissenting opinions and the intrinsic importance of the question itself. The facts were these: In accordance with the provisions of an Act of Congress, called the "Enabling Act," whereby the people of Oklahoma and Indian Territory were authorized to form a constitution and state government; a convention was called, a constitution was framed, and an ordinance was enacted providing the machinery for an election wherein the proposed constitution was to be submitted to the people of the two territories for ratification or rejection. The Enabling Act, though it did not refer in express terms to this election, required that the election laws of Oklahoma Territory remain in force, so far as applicable, until changed by the legislature of the proposed state.

The proposed constitution contained a provision whereby two new counties, Alfalfa and Major, were to be created from parts of Woods and Woodward counties, the latter having enjoyed organized county governments under the territorial regime. This provision was so incorporated in the proposed constitution that it was impossible to vote against it without rejecting the entire constitution.

By the terms of the ordinance enacted by the convention for the purpose of submitting the constitution to the people, county officials were appointed for each of the new counties, and these officials were directed to divide the new counties into voting precincts, and to preside at the election at which the constitution was to be submitted to the people. It will thus be seen that the convention was putting the provisions of the constitution into practical effect before it had ever been submitted to the people for ratification, in seeming violation of the implied requirement of the Enabling Act that this election be conducted in accordance with the territorial election laws.

The plaintiff, a commissioner of Woods county, under the territorial government, brought an action to restrain the president of the convention, the secretary of the convention, and the governor of Oklahoma Territory from submitting to the people of the two territories, either as a part of the proposed constitution or as a separate ordinance, any proposition providing for the division of Woods county, and further to restrain the officials appointed for the new counties by the terms of the ordinance from usurping or interfering in any way with the performance of the duties of the officials of that county under the territorial organization.

A majority of the court held that the convention was a sovereign body possessed of the highest legislative duties, that it derived its powers from the people and not from the Enabling Act, and that the proceedings of such a body in the performance of its functions were not subject to judicial control. The court proceeds, however, to show that the provisions of the ordinance and of the proposed constitution which were brought into question by this

action were within the powers granted by the Enabling Act, and apparently much comfort is derived from this fact.

Two vigorous dissenting opinions were rendered and a third judge, though dissenting, took no part because he had presided at the trial. These opinions differ from each other as to the relief which should have been granted, but they unite in holding that a constitutional convention is a mere committee with authority to frame a constitution, that its powers are limited by the terms of the Enabling Act, and that, when it attempts to transcend those powers in such a manner as to interfere with vested rights, the courts can and must give aid when so requested.

The dissension in the Oklahoma court seems to have its origin in two theories which obtain regarding the nature of conventions of this sort, and from which are derived widely divergent views regarding their powers. The first, which seems to have been followed by the majority of the Oklahoma court, is "that the convention is *a strictly representative body,* acting for and in the name of the sovereign, and possessed by actual transfer, of all the powers inherent in that sovereign, limited, however, in the case of conventions in the several states, by the Constitution of the United States." JAMESON, CONSTITUTIONAL CONVENTIONS, 4th ed., p. 302. The learned writer, after thus stating the theory, makes a most vigorous and sarcastic attack on it, and his work is of such merit and has been quoted so often by courts and text writers in this country, that it must be accorded great weight in any treatment of the subject. The theory finds judicial support, perhaps, in the case of *State* v. *Neal* (1868), 42 Mo. 119, in which it was held that a constitutional convention might prescribe the qualifications of electors voting for the ratification or rejection of the proposed constitution, and that a person who swore falsely as to these qualifications was guilty of perjury. The cases of *Goodrich* v. *Moore* (1858), 2 Minn. 61 (Gil. 49); *Sproule* v. *Frederick* (1892), 69 Miss. 898; *Loomis* v. *Jackson* (1873), 6 W. Va. 613; *Benner* v. *Porter* (1850), 9 How. 235, and *Shertz* v. *First National Bank of Chester* (1893), 47 Ill. App. 124, the first four of which were quoted by the Oklahoma court, are cases that contain dicta upholding this theory, but, as no authorities are cited, and the remarks are purely obiter, they render the doctrine very little support.

The second theory is that a convention of this sort "is a mere committee, sitting for a specified purpose, under the express mandate of the sovereign, and possessed of such powers only as are expressly granted, or as are necessary and proper for the execution of powers expressly granted. This theory evidently discards the notion, so much cherished by the advocates of the former, that the convention is clothed with sovereign attributes, though doubtless intrusted to some extent, under the strict regulations, intended to secure responsibility, with their exercise." JAMESON, CONSTITUTIONAL CONVENTIONS, 4th ed., p. 302. It is in accordance with this theory that the dissenting opinions in the Oklahoma case were rendered, and this view seems to accord with the great weight of judicial and text-book authority. In *McDaniell's Case* (1834), 2 Hill, Law (S. C.) 1, 270, the court said, "But the question was made whether the convention which passed the ordinance was not limited by the purpose for which it was assembled; and I am of the opinion that it was

so limited. And this detracts in no degree from the sovereign character of its act when within that purpose. We have no authority to judge of, revise, or control any act of the people; but when anything is presented to us as the act of the people, we must of necessity judge or determine whether it be indeed their act. The sole difficulty seems to me to have arisen from confounding together the authority attributed by the constitution to the *people,* with that of the *convention.* Certainly the convention was not the people for any other purpose than that for which the people elected and delegated them."

Wells v. *Bain* (1874) 75 Pa. St. 39, is a case in which the facts practically square with those of the Oklahoma case. An attempt was made in the majority opinion to discredit this case, but it has been cited so often by courts and text-writers, and its reasoning is so persuasive that it may well be considered the law on the question. The court says (pp. 56-57), "As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. * * * The convention is not a coordinate branch of the government, but is a body raised by law in aid of the popular desire to discuss and propose amendments which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority and the citizens injured thereby are entitled, under the declaration of rights, to an *open* court and to redress at our hands."

In the case of *Wood's Appeal* (1874), 75 Pa. St. 59, the same questions were considered, and the theory that a constitutional convention is a sovereign body was most vigorously assailed. The court concludes a powerful opinion by saying (pp. 74-75), "We find nothing in the Bill of Rights, in the vote under the Act of 1871, or the authority conferred in the Act of 1872, nothing in the nature of delegated power, or in the constitution of the convention itself, which can justify an assumption that a convention so called, constituted, organized and limited, can take from the people their sovereign right to ratify or reject a constitution or ordinance framed by it, or can infuse present life and vigor into its works before its adoption by the people."

The following authorities accord with this view: JAMESON, CONSTITUTIONAL CONVENTIONS, 4th ed., Chapter VI; COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed. p. 62, *State* v. *Keith* (1869), 63 N. C. 140; *Plowman* v. *Thornton* (1875), 52 Ala. 559; *Berry* v. *Bellows* (1875), 30 Ark. 198; *Gibbes* v. *G. & C. Railroad So.* (1878), 13 S. C. 228; *Bragg* v. *Tuffts* (1887), 49 Ark. 554; *Quinlan* v. *Houston & T. C. Ry. Co.* (1896), 89 Tex. 356; and *Ex parte Birmingham & A. R. Co.* (1905), — Ala. —, 42 So. 118. It would seem that the decision of the Oklahoma court, in according to the convention the attributes of sovereignty, thereby denying itself jurisdiction to restrain that body from interfering with the vested rights of the officials of the territorial government, without popular or congressional sanction, was out of accord with the weight of authority. C. A. D.